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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1418

MADELINE BUCHANAN, ET AL., *Appellants*

v.

BRENDA EVANS, ET AL., *Appellees*

On Appeal from the United States District Court for the District of Delaware

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	Page
MOTION TO DISMISS OR AFFIRM	1
OPINION BELOW	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
ARGUMENT	8
I. THIS APPEAL SHOULD BE DISMISSED AS PREMATURE SINCE NO INJUNCTION HAS ISSUED INTERFERING WITH THE OPERATION OF THE CHALLENGED STATE STATUTE	8
II. AFFIRMANCE OF THE DECISION BELOW IS DICTATED BOTH BY THE PRINCIPLES OF MILLIKEN AND ALLIED CASES AND BY ESTABLISHED EQUAL PROTECTION DOCTRINE REQUIRING INVALIDATION OF UNJUSTIFIED RACIAL CLASSIFICATIONS	12
A. The Decision Below Is Consistent with Principles Enunciated by This Court in *Milliken* v. *Bradley* and with Decisions of Courts of Appeals Rendered Both Before and After *Milliken*	12
1. Delaware's Redrawing of School District Lines	14
2. The Interdistrict Segregative Effect of the School Violations	17
3. Racial Containment Through State Housing Policies	19
B. Invalidation of the Delaware Educational Advancement Act Was Required by the Well Established Equal Protection Doctrine That Racial Classifications Must Fall Unless Supported by a Compelling Justification	23
CONCLUSION	26
CERTIFICATE OF SERVICE	28

TABLE OF CASES AND OTHER CITATIONS

Page

CASES:

Bradley v. *School Board of the City of Richmond*, 338 F. Supp. 67 (E.D. Va. 1970), *rev'd*, 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92 (1973) 14, 15, 20, 21

Brown v. *Board of Education*, 347 U.S. 483 (1954) ... 3

Crow v. *Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd per curiam*, 457 F.2d 788 (5th Cir. 1972) 22

Evans v. *Buchanan*, 152 F. Supp. 886 (D. Del. 1957), *aff'd*, 256 F.2d 688 (3d Cir. 1958) 4

Evans v. *Buchanan*, 379 F. Supp. 1218 (D. Del. 1974) 4, 5, 8, 25

Evans v. *Buchanan*, — F. Supp. —, No. 74-1418 (D. Del., Mar 27, 1975) ..... *passim*

Evans v. *Ennis*, 281 F.2d 385 (3d Cir. 1960) 4

Evans v. *Ennis*, 195 F. Supp. 321 (D. Del. 1961) 4

Gaffney v. *Cummings*, 412 U.S. 735 (1973) 25

Gautreaux v. *Romney*, 448 F.2d 731 (7th Cir. 1971) .. 22

Gerstein v. *Coe*, 419 U.S. 98 (1974) 9, 11

Goldstein v. *Fox*, 396 U.S. 471 (1970) 10

Gomillion v. *Lightfoot*, 364 U.S. 339 (1960) 25, 26

Gunn v. *Committee to End the War in Vietnam*, 399 U.S. 383 (1970) 9, 11

Haney v. *County Board of Education of Sevier County*, 410 F.2d 920 (8th Cir. 1969); 429 F.2d 364 (8th Cir. 1970) 17

Higgins v. *Grand Rapids Board of Education*, 508 F.2d 779 (6th Cir. 1974) 16

Hoots v. *Commonwealth of Pennsylvania*, 359 F. Supp. 807 (W.D. Pa. 1973), *appeal dismissed*, 495 F.2d 1095 (3d Cir. 1974), *cert. denied*, 419 U.S. 884 (1974) 16

Hunter v. *Erickson*, 393 U.S. 385 (1969) 24, 25

James v. *Valtierra*, 402 U.S. 137 (1971) 25

Jefferson v. *Hackney*, 406 U.S. 535 (1972) 25

Kennedy v. *Mendoza-Martinez*, 372 U.S. 144 (1963) .. 12

Keyes v. *School District No. 1, Denver*, 445 F.2d 990 (10th Cir. 1971), *modified*, 413 U.S. 189 (1973) .. 12

Page

Lee v. *Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935 (1971) 23

Loving v. *Virginia*, 368 U.S. 1 (1967) 26

McLaughlin v. *Florida*, 379 U.S. 184 (1964) 26

Milliken v. *Bradley*, 338 F. Supp. 582 (E.D. Mich. 1971), *aff'd in part, vacated in part*, 484 F.2d 215 (6th Cir. 1972), *rev'd*, 418 U.S. 717 (1974) ..... *passim*

Newburg Area Council v. *Board of Education of Jefferson County, Kentucky*, Nos. 73-1403, 73-1408 (6th Cir., Dec. 17, 1974), *cert. denied*, 43 U.S.L.W. 3571 (Apr. 21, 1975) 19

Palmer v. *Thompson*, 403 U.S. 217 (1971) 25

Reitman v. *Mulkey*, 387 U.S. 369 (1961) 25

San Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973) 25

Shannon v. *HUD*, 436 F.2d 809 (3d Cir. 1970) 22

Swann v. *Charlotte-Mecklenburg Board of Education*, 431 F.2d 138 (4th Cir. 1970), *rev'd*, 402 U.S. 1 (1971) 10, 12

Taylor v. *Board of Education of New Rochelle*, 191 F. Supp. 181 (S.D.N.Y. 1961), *appeal dismissed*, 288 F.2d 600 (2d Cir. 1961); 195 F. Supp. 231 (S.D. N.Y. 1961), *aff'd*, 294 F.2d 36 (2d Cir. 1961), *cert. denied*, 368 U.S. 940 (1961) 12

United States v. *Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3671 (June 24, 1975) 22

United States v. *Board of Commissioners of the City of Indianapolis, Indiana*, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3569 (Apr. 21, 1975) 16

United States v. *Missouri*, — F.2d —, No. 75-1051 (8th Cir., May 14, 1975) 17

United States v. *State of Texas*, 321 F. Supp. 1043 (E.D. Tex. 1970), *modified and aff'd*, 447 F.2d 421 (5th Cir. 1971), *cert. denied sub nom. Edgar* v. *United States*, 404 U.S. 1016 (1972) 17

White v. *Regester*, 412 U.S. 755 (1973) 25

Wright v. *Council of the City of Emporia*, 407 U.S. 45 (1972) 25, 26

Page

OTHER CITATIONS:

VA. CONST. ART. 8, §§ 2, 5(c) 15
28 U.S.C. § 1253 9
Education Advancement Act of 1968, 14 Delaware Code §§ 1001 *et seq.* 8, 9, 10, 14
Va. Code Ann. § 22-30 (1973) 15

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MOTION TO DISMISS OR AFFIRM

The Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the United States District Court for the District of Delaware entered on April 16, 1975 on the grounds that the appeal is not within the jurisdiction of this Court, and that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The recent opinion of the United States District Court for the District of Delaware, Civil Action Nos. 1816-1822, March 27, 1975, is not yet reported. That opinion is set out in Appendix A of Appellants' Jurisdictional Statement. The earlier opinion in this case is reported at 379 F. Supp. 1218.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. AMEND. XIV, SEC. 1: . . . .; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Educational Advancement Act of 1968

14 Del. C. § 1001 *et seq.*, §§ 1004(c)(2)-(4).

(c) On or before March 1, 1969, the State Board of Education shall meet and adopt a final plan of reorganization of school districts which it deems wise and in the best interests of the educational system of this State; provided, that no plan of reorganization of school districts shall be adopted which fails to meet the following requirements: . . . .

(2) Each proposed school district including more than one component former school district shall have a pupil enrollment of not less than 1900 nor more than 12,000 in grades 1 through 12. "Pupil enrollment" as used in this subsection means enrollment as of September 30, 1968. Excluding vocational-technical districts there shall be no fewer than 20 nor more than 25 reorganized school districts.

(3) Each proposed school district which is composed of more than one existing school district shall be composed of only whole existing school districts except as herein defined and only to the extent that those whole existing school districts are contiguous as reorganized. No existing school district shall be subdivided in order to form any proposed school district except a superimposed high school district, which may be subdivided.

(4) The proposed school district for the City of Wilmington shall be the City of Wilmington with the territory within its limits. . . . .

STATEMENT

In *Milliken* v. *Bradley,* 418 U.S. 717 (1974), this Court foresaw that circumstances might arise in public school segregation cases where the character of the violation would warrant a remedy that encompassed more than one school district. Such a violation of constitutional rights has occurred in school districts in New Castle County, Delaware, an area of some 435 square miles with approximately 87,000 public school students (A. 6, 32).*

The history of the proceedings giving rise to this issue is in some respects all too familiar to this Court. More than twenty-one years after this Court's decision in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), public schools in Wilmington, the core district in New Castle County, remain racially identifiable[1] and, as

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* All references to the Appendix are made to the Appendix in Appellants' Jurisdictional Statement.

[1] Five public schools in Wilmington (three elementary, one junior high and one high school) that were designated as black schools before *Brown* and that were 90 to 100% black in 1956 re-

the court below held unanimously, previous school desegregation plans have never proved effective and a unitary school system for Wilmington has never been established. 379 F. Supp. 1218, 1223.

In one respect, even this history is unusal, for from the very outset of this case the appellant State Board of Education, because of the uniquely broad control it exercises over public education in Delaware has been the primary defendant and has been held directly responsible for the defaults that have occurred at several stages of these proceedings. Thus, when in 1957 the lower court found that no appreciable steps had been taken to effectuate compliance with the mandate of *Brown* in several Delaware districts, it was the appellant state board, which had been a party defendant in the original consolidated *Brown* case, that was culpable for this dereliction of constitutional duty. *Evans* v. *Buchanan,* 152 F. Supp. 886, 887 (D. Del. 1957), *aff'd,* 256 F.2d 688, 693-694 (1958). It was appellant's plan that was adjudged unsatisfactory by the court below in 1960 and the new desegregation order ran against the appellant. *Evans* v. *Ennis,* 281 F.2d 385, 390-391 (3d Cir. 1960). When a new plan was approved in 1961, it was appellant state board over whom the court retained jurisdiction to determine the effectiveness of the manner in which the plan was implemented. 195 F. Supp. 321, 325. And it was the appellant state board that was primarily responsible for the fact that despite the 1961 plan *de jure* violations in Wilmington persisted. 379

mained 90 to 100% black in 1973. 379 F. Supp. at 1223 n.8. Correspondingly, schools in other districts in New Castle County that were historically white remained 90% or more white in 1973, a fact that led one judge below to conclude that "it is not only in Wilmington that vestiges remain." *Id.* at 1229-1230 (Gibbons, J.).

F. Supp. at 1222-24. In 1971, a group of intervening plaintiffs filed an amended complaint alleging that a 1968 state statute reorganizing Delaware school districts had segregated black children in New Castle County within the Wilmington school district. Plaintiffs further alleged that the state-imposed dual school system had never been eliminated in Wilmington and New Castle County.

As the court below succinctly stated, "it is well established that to the extent that any schools in the state are in violation of *Brown* and its progeny or of this Court's orders, the State Board must bear primary responsibility." 379 F. Supp. 1218, 1222 (*see also* A. 2).

What makes this case materially different in its facts, however, from any this Court has previously considered is that not only did the appellant state board and other state officials participate in the perpetuation of segregation in the public schools of Wilmington, but they also contributed substantially to the creation and maintenance of a *de jure* segregated situation as between Wilmington and the surrounding school districts of New Castle County.

First, during the entire 21-year period when Wilmington schools have been out of compliance with the *Brown* mandate, Delaware state officials have pursued policies that have fostered racial segregation by providing new housing opportunities for whites in the suburbs of Wilmington while keeping black citizens largely contained within the Wilmington district (A. 10-11).

While the initial policies in which the Federal Housing Administration participated, by calling for the development of racially and economically homogeneous

neighborhoods as a condition for underwriting suburban mortgages, were formally terminated before the advent of the *Brown* decision, they contributed significantly to the initial establishment of segregated communities in New Castle County (A. 10). And overt state encouragement of racial discrimination in housing continued throughout the 1950s and 1960s in various forms: through the continued recordation of racially restrictive covenants (A. 10); through the Delaware Real Estate Commission's publication and sanction of the realtors' code of racial exclusivity (A. 10); through operation of a multi-list system by the Greater Wilmington Board of Realtors under which in the years 1965-67 only 7% of all new listings in the Wilmington suburbs were open to minority buyers (A. 11).

Delaware's policies of racial containment in housing were implemented not simply by encouragement and toleration of discrimination by the private housing industry but by practices of discrimination in housing provided directly by state officials. Thus, although the Wilmington Housing Authority until 1972 had jurisdiction to establish public housing units (whose eligible occupants are predominantly black (A. 12 n.13)), outside the city limits it was almost entirely unsuccessful in securing such sites (A. 11). And the New Castle County Housing Authority, established in 1972, was thwarted by the actions of the New Castle County Council and failed to build any new public housing units.

During the period from 1954 to 1973, the public school enrollment of New Castle County expanded from 21,543 children (of whom 4% were black) to 73,008 (of whom 6% were black) (A. 7). This large county popu-

lation growth corresponded with the growth of identifiably black schools in Wilmington which went from a 28% black system in student enrollment (with a total enrollment of 12,875) to an 83% black system (with a total enrollment of 14,688) (A. 7). As the court below found, these changes resulted "not exclusively from individual residential choice and economics, but also from assistance, encouragement and authorization by governmental policies" (A. 10).

Second, actions by Delaware school officials also contributed to the growth of segregated schools in New Castle County. Prior to 1954 and for a period thereafter, children in New Castle County were assigned across district lines on a segregated basis, leading the court below to find "a historic arrangement for interdistrict segregation within New Castle County" (A. 33). More recently, optional attendance zones established in the Wilmington school district allowed white students to attend schools in attendance areas other than those in which they resided (A. 12). The resultant increase in the proportionate black school population in the transferor schools, the court below found, may have encouraged an exodus of white families and "discouraged white families from moving in," the impact being felt in the racial composition of housing and schools in the suburbs as well as the city (A. 12-13). In addition, beginning in 1968 the state board implemented a substantial program of transportation subsidies for children attending private schools which included subsidies for travel across district lines (A. 13-14). While the interdistrict aspect of the program violated the provisions of the authorizing state statute, the Delaware legislature's response was to amend the statute in 1973 to authorize the previously illegal sub-

sidies. Noting that such non-public schools were 94% white, the court below concluded that the subsidy augmented the racial disparity between Wilmington and county school populations (A. 14).

The third major action contributing to the maintenance and perpetuation of segregated schools in the New Castle County area was the separate and disparate treatment given Wilmington by the Delaware legislature in a general reorganization of all Delaware school districts accomplished through the Educational Advancement Act of 1968. 14 Del. C. § 1001 *et seq.*[2] When the legislature acted in 1968 the Wilmington district was 66% black in its enrollment, well along in the process of becoming a separate black island in a predominantly white metropolitan area (A. 18). Nevertheless, Wilmington was specifically exempted by name from the grant of authority contained in the Act which constituted all districts in the state as "reorganized school districts" and established an expeditious procedure enabling the State Board of Education to consolidate contiguous districts (A. 18). The Act not only exempted Wilmington from these procedures but fixed the boundaries of the district to encompass only the territory within the City of Wilmington. 14 Del. C. § 1004(c)(4). Thus, the Wilmington lines were fro-

[2] In part, this statute was a response to the 1961 decree of the court below which called upon the state defendants to submit a new school code to the Delaware General Assembly, including provisions for consolidating districts to eliminate all distinctions based on race. At least two previous attempts by the State Board to do what in 1961 it told the court was necessary to eliminate a state-imposed, state-wide dual system had been rejected by the legislature. After those rejections no action was taken until 1968. 379 F. Supp. at 1221, 1232.

zen when virtually all other Delaware districts were made freely subject to change at a time when the actual, probable and foreseeable effect of the action was to foster racial segregation.

On the basis of such actions by the state legislature and by state officials having jurisdiction over schools and housing, the court below concluded that "governmental authorities are responsible to a significant degree for the increasing disparity in residential and school populations between Wilmington and its suburbs in the past two decades" (A. 17); that several interdistrict violations of the kind contemplated by *Milliken* had occurred (A. 31, 33); and that there was ample basis for requiring the preparation of a plan for interdistrict relief to be considered along with intradistrict plans in determining a feasible remedy that would redress the denial of appellees' constitutional rights.

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED AS PREMATURE SINCE NO INJUNCTION HAS ISSUED INTERFERING WITH THE OPERATION OF THE CHALLENGED STATE STATUTE.

Appellants' effort to obtain review of this case is premature because no injunctive relief has been granted from which an appeal will lie under 28 U.S.C. § 1253. The unambiguous language of § 1253 and a consistent line of decisions by this Court make it clear that the indispensable predicate of an appeal is an injunction, either interlocutory or permanent, interfering with the operation of the challenged statute. *Gerstein* v. *Coe*, 419 U.S. 98 (1974); *Gunn* v. *Committee to End the War*

in Vietnam, 399 U.S. 383 (1970); *Goldstein* v. *Cox,* 396 U.S. 471 (1970).

No such injunction has issued in this case. What the court below did was to *declare* that provisions of Delaware's Educational Advancement Act of 1968, 14 Del. C. § 1001 *et seq.,* were unconstitutional insofar as they excluded the Wilmington School District from eligibility for reorganization with other districts (A. 33). At this stage of the proceedings the only effect of this declaration is to assure that the court will consider plans for interdistrict relief along with plans for intradistrict relief in determining what remedy to afford to individual appellees, whose constitutional rights, as all parties acknowledge in this Court, have been violated. The court below has yet to make findings that will be critical in determining whether the ultimate form of relief to be granted will involve other districts or will be wholly within the district of Wilmington. The opinion recognizes that before ordering any form of interdistrict relief, the court must examine whether such a remedy is necessary "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct" (A. 31, *citing Millken* v. *Bradley,* 418 U.S. 717, 746 (1974)), and the court indicates that it must determine if such relief is feasible under the principles set down by this Court in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 22-26 (1971) (A. 31-33).

The court below prudently decided that these critical determinations could best be made in the light of concrete alternative plans for intradistrict and interdistrict relief proposed by the parties. Lacking these plans, which are to be considered in the Fall of 1975,

the court said that it "cannot speculate on the scope of the proper remedy" (A. 31).[3]

Thus, the constitutional issues on which appellants would have this Court rush to judgment may never arise. Should the court below conclude in further proceedings that on any of the grounds left open by its opinion of March 27, 1975, relief must be confined to the Wilmington school district, an order for interdistrict relief will never issue. In the interim, the court's declaratory judgment that the Educational Advancement Act is unconstitutional has no prejudicial effect upon any of the parties. It does not command or inhibit action by the State Board of Education with respect to any other area of the state, and indeed the reorganization powers granted by the Act have long since lapsed (A. 33). The only consequence of the declaratory judgment is that appellants may not rely upon the Act in preparing plans for the court to consider in deciding what type of injunctive relief it will ultimately issue.

This may seem an inconvenience to appellants but it no more constitutes interference with the operation or enforcement of a state statute than the lower court decisions in *Gunn* and *Gerstein, supra,* which this Court appropriately declined to review. Nor does it remotely approach action which "paralyze[s] totally the operation of an entire regulatory scheme . . . by issuance of a broad injunctive order," justifying direct and rapid

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[3] While the court would not speculate about the ultimate scope of remedy, appellants apparently feel free to do so in implying throughout their statement that the court has already undertaken to impose an interdistrict remedy (*see, e.g.,* Appellants' Jurisdictional Statement at 5, 12). Yet such speculation will not prevent appellants from arguing forcefully in further proceedings that interdistrict remedy is not feasible.

review by this Court of a lower court decision. *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 154 (1963). Lacking such action by the court below, there is every reason for this Court to dismiss the appeal in light of appellants' failure to meet jurisdictional requirements and in view of sound considerations of judicial economy.[4] Appellants will have time enough to obtain a full review of their claims if the injunctive order they now apprehend looming on the horizon actually materializes.[5]

II. AFFIRMANCE OF THE DECISION BELOW IS DICTATED BOTH BY THE PRINCIPLES OF MILLIKEN AND ALLIED CASES AND BY ESTABLISHED EQUAL PROTECTION DOCTRINE REQUIRING INVALIDATION OF UNJUSTIFIED RACIAL CLASSIFICATIONS.

A. The Decision Below Is Consistent With Principles Enunciated by This Court in Milliken v. Bradley and With Decisions of Courts of Appeals Rendered Both Before and After Milliken.

While appellants understandably prefer to focus upon only those portions of *Milliken* which state the

[4] While the statutory considerations are somewhat different it is relevant to note that school desegregation cases ordinarily reach this Court for discretionary review only after lower courts have ruled both on questions of liability and appropriate remedy together. *See, e.g.,* Keyes v. School Dist. No. 1, Denver, 445 F.2d 990 (10th Cir. 1971) *modified* 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138 (4th Cir. 1970), *rev'd,* 402 U.S. 1 (1971); Taylor v. Bd. of Educ. of New Rochelle, 191 F. Supp. 181 (S.D.N.Y. 1961), *appeal dismissed,* 288 F.2d 600 (2nd Cir. 1961); 195 F. Supp. 231 (S.D.N.Y. 1961), *aff'd,* 294 F.2d 36 (2nd Cir. 1961), *cert. denied,* 368 U.S. 940 (1961). In the rare case where this Court has reviewed a school desegregation case in the absence of an approved plan for remedy, the courts below have at least determined specifically the type of relief to be afforded. *See* Milliken v. Bradley, 418 U.S. 717 (1974).

[5] Hearings in the court below on proposed interdistrict and intradistrict plans are not scheduled to begin until October 20, 1975. No plans for pupil reassignment for the 1975-76 school term have been proposed by any of the parties.

basis for denying relief, this Court quite carefully limited that decision to the factual record before it and took pains to delineate circumstances in which it would be appropriate to find a violation leading to interdistrict relief. In the view of the Justices in the *Milliken* majority, a "cross district remedy" may be justified if:

> 1. "[D]istrict lines have been deliberately drawn on the basis of race," 418 U.S. at 745, or state officials "contributed to the separation of the races by drawing or redrawing school district lines," *id.* at 755 (Stewart, J. concurring); *or*
>
> 2. There has been a constitutional violation within one district that produces a significant segregative effect in another district, *id.* at 745; *or*
>
> 3. State officials "had contributed to the separation of the races . . . by purposeful racially discriminatory use of state housing or zoning laws," *id.* at 755 (Stewart, J. concurring).

With this decision before it, the court below carefully examined all of the evidence before finding that such violations had occurred in each of the categories enumerated. Appellants' entire argument rests upon a procrustean effort to stretch, bend and twist the facts of this case to make them fit those of *Milliken* and other decisions in an attempt to convince this Court that the issues have already been decided. But, as will be shown, Wilmington presents new facts, materially different from those in *Milliken.* Indeed, the lower court's conclusions here were entirely consistent with the opinion in *Milliken* and with numerous courts of appeals decisions rendered both before and after the *Milliken* decision.

1. Delaware's Redrawing of School District Lines

Under the Educational Advancement Act of 1968 all districts in the State of Delaware became "reorganized school districts" and an expeditious procedure was established to enable the State Board of Education to consolidate contiguous districts (A. 18). The only named exception in the Act was the Wilmington School District, which at the time of enactment was 66% black in student enrollment and contained 44% of all black pupils in Delaware public schools.[6] As to the reorganized Wilmington district, the Act flatly stated that the boundaries were fixed to encompass only the territory within the City of Wilmington. 14 Del. C. § 1004(c)(4).

We demonstrate *infra* that principles of equal protection firmly established by this Court require that such a statute be invalidated as a prohibited racial classification absent a showing of a compelling state interest that was not forthcoming in the court below. Here it suffices to note that facially the statute fits the first standard for an interdistrict violation enunciated in *Milliken* and that neither *Milliken* nor any other case suggests otherwise.

Appellants' efforts to avoid this conclusion by claiming that virtually identical statutes were held not to constitute violations in *Milliken* and in *Bradley* v. *School Board of the City of Richmond,* 462 F.2d 1058 (4th Cir. 1972), *aff'd by an equally divided Court,* 412 U.S. 92 (1973), simply do not stand scrutiny. Unlike

[6] Wilmington and one other district also were inferentially excluded from reorganization by provisions limiting total district enrollment to 12,000 pupils and barring the subdivision of existing districts in the formation of new districts. 14 Del. C. § 1004(c)(2), (3).

the Delaware statute, Michigan's "Act 48" dealt only with the assignment of children *within* the Detroit school district. Indeed as this Court noted, Act 48 rescinded a desegregation plan that "affected only 12 of 21 Detroit high schools and had no causal connection with the distribution of pupils by race between Detroit and the other school districts within the tri-county area." 418 U.S. at 750. Whatever else one may conclude about the Delaware Act, its impact was certainly not limited to the distribution of students within the City of Wilmington and the Wilmington exception certainly was causally connected with the distribution of students in the Wilmington metropolitan area.

In *Richmond,* the 1971 provisions of the Virginia Constitution did deal with the subject of consolidation. But unlike the Delaware statute, the new Virginia Constitution and statutes[7] did not single out Richmond or any jurisdiction having large black student enrollments for separate and disparate treatment. Nor did they freeze the boundaries of Richmond or constitute it a reorganized district as the Delaware Act did with respect to Wilmington. Rather Virginia, as noted in the Fourth Circuit opinion, simply prevented the State Board of Education from "acting alone" to effect a consolidation of Richmond and surrounding systems under the control of a single school board. 462 F.2d at 1067. And this, as the court pointed out, did not materially change the situation that existed under the old constitution and statutes. Accordingly, there was no colorable claim that the 1971 Virginia provisions constituted an interdistrict violation.

What solace appellants derive from other circuit opinions they cite is even more puzzling. In *United*

[7] Va. Const. art. 8, §§ 2, 5(c); Va. Code Ann. § 22-30 (1973).

States v. *Board of Commissioners of the City of Indianapolis, Indiana,* 503 F.2d 68 (7th Cir. 1974), the issue is whether an extension of the political boundaries of Indianapolis without a like reestablishment of school district boundaries constitutes an interdistrict violation. The court of appeals remanded the case to the district court for a determination of this issue in accordance with *Milliken,* this Court denied certiorari, 43 U.S.L.W. 3569 (April 21, 1975), and the United States is urging in the district court that such an interdistrict violation has occurred. In *Higgins* v. *Grand Rapids Board of Education,* 508 F2.d 779, 796 (6th Cir. 1974), the statute discussed merely imposed a requirement of local consent when school district boundaries were to be extended to include politically annexed territory; it bore a remote resemblance to the Virginia constitutional provision but has not the faintest connection with the Delaware statute at issue here.

Far more relevant (although unmentioned by appellants) was the decision in *Hoots* v. *Commonwealth of Pennsylvania,* 359 F. Supp. 807 (W.D. Pa. 1973), *appeal dismissed,* 495 F.2d 1095 (3rd Cir. 1974), *cert. denied,* 419 U.S. 884 (1974), where the district court found that actions under a Pennsylvania statute providing for the reorganization of school districts which resulted in the concentration of black children in particular districts contravened the Fourteenth Amendment. There was no evidence that black children were less segregated under the previous form of organization or even that previous segregation was caused by *de jure* acts; yet the court held that when the state engaged in a general reorganization of school districts it could not intentionally establish or maintain segregated school districts. 359 F. Supp. at 823. So too the Eighth Circuit sitting *en banc* has recently unanimously held that

the continuation of a segregated black school district over a period of time when other districts were being reorganized through annexation gave rise to a duty to merge for purposes of integration. *United States* v. *State of Missouri,* No. 75-1051 (8th Cir., May 14, 1975). While agreeing that the Ferguson district, sought to be included in the merger, had not actively participated in the creation of the segregated Kinloch district, the court said that intentional segregation in the past could "not be ignored in assessing the impact of present inaction which has the effect of maintaining segregation." Slip op. at 9-10. Cf. *United States* v. *State of Texas,* 321 F. Supp. 1043 (E.D. Tex. 1970), *modified and aff'd,* 447 F.2d 421 (5th Cir. 1971), *cert. denied sub nom., Edgar* v. *United States,* 404 U.S. 1016 (1972); *Haney* v. *County Board of Education of Sevier Conty,* 410 F.2d 920 (8th Cir. 1969); 429 F.2d 364 (1970).

In sum, the Delaware statute on its face is an enactment that redraws district lines in a manner contributing to the separation of the races. Neither in *Milliken* nor in any other case has this Court or any other court sustained such a statute. To the contrary, similar enactments have been invalidated by lower courts in several cases.

2. The Interdistrict Segregative Effect of the School Violations

In their zeal to treat *Milliken* as having closed the door on interdistrict remedy, appellants have distorted both the holding and the factual findings of that case. *Milliken* did not hold that for an interdistrict violation to have occurred suburban districts must have participated in the violation (see Appellants' Jurisdictional Statement at 21); rather, this Court made clear that the discriminatory actions of a single district would suffice

if it were demonstrated that these actions affected the schools of other districts. 418 U.S. at 725.

Accordingly, under *Milliken* if a showing is made that *de jure* practices of the central city district had a segregative impact upon the racial composition of suburban schools, the elements of an interdistrict violation are established. Contrary to appellants' assertion, the lower courts in *Milliken* did not weigh the interdistrict effects of central district violations such as the use of optional attendance zones. The court below in this case did conscientiously seek to determine if there were such effects and concluded, reasonably, that the use of optional zones in Wilmington may have affected the composition of suburban schools by encouraging white families to move out of school areas where this *de jure* practice increased segregation and by discouraging white families from moving in.

Appellants have similarly mischaracterized the state transportation subsidy issue in *Milliken*. There, the lower courts were concerned only with the differential nature of Michigan's treatment of *intradistrict* transportation in Detroit and its suburbs. 338 F. Supp. at 589. Here, the court below dealt with a state scheme subsidizing the attendance of children who reside in Wilmington in private schools *outside* the district which, given the virtually all-white composition of private schools, augmented racial disparities between the Wilmington and suburban school district populations (A. 13-14). Whether considered as state action having an interdistrict effect or simply as an illustration of the permeability of district lines in New Castle County which illuminated the character of other governmental acts, Delaware's interdistrict transportation subsidy was far more relevant than the transportation subsidies considered in *Milliken*.

Lastly, the single "isolated instance" of suburban black children attending black public schools in Detroit, which this Court noted in *Milliken* involved only two of the 52 affected districts (418 U.S. at 750), stands in stark contrast to the situation that existed in the Wilmington metropolitan area. In Wilmington during the 1950s black students from seven New Castle County districts not only attended a black high school in the Wilmington district but several black elementary and junior high schools as well (A. 8). Moreover, white students from "virtually all suburban districts" attended white schools in Wilmington, and with respect to one school, attendance of children across district lines continued until the late 1960s (A. 9 n.8). While the court below did not treat withdrawal of the children as an independent violation, it did have a solid basis for concluding that unlike the situations in *Milliken* and *Richmond*, "*de jure* segregation in New Castle County was a cooperative venture involving both city and suburbs" (A. 16). At minimum, this "historic arrangement for interdistrict segregation" (A. 33) was a proper context in which to view subsequent governmental actions contributing to the racial isolation of city from suburbs. On very similar facts involving Louisville and Jefferson County, Kentucky, the Sixth Circuit reinstated after *Milliken* an order for interdistrict remedy. *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky,* Nos. 73-1403, 1408 (6th Cir., Dec. 11, 1974), *cert. denied,* 43 U.S.L.W. 3571 (April 21, 1975).

3. Racial Containment Through State Housing Policies

This Court's opinion in *Milliken,* joined in by all five members of the majority, explicitly stated that "in its present posture, the case does not present any question

concerning possible state housing violations," 418 U.S. at 728 n.7, noting that the issue had not been considered in the court of appeals. Accordingly, the Court had no occasion to judge the adequacy of the record on housing discrimination made in the trial court.

Milliken does, however, contain important guidance on the relevance of proof of housing discrimination to the quest for an interdistrict school remedy. In stating that a cross district remedy may be warranted if state officials "had contributed to the separation of the races . . . by purposeful racially discriminatory use of state housing or zoning laws," 418 U.S. at 755, Mr. Justice Stewart's concurring opinion delineated an appropriate standard for future cases. The fact that Mr. Justice Stewart did not find the Detroit record sufficient to meet this standard is neither surprising nor prejudicial to appellees in the instant case. For the trial court in *Milliken* (and in *Richmond* as well)[8] simply catalogued a variety of discriminatory housing practices without carefully assessing whether such practices effectively excluded blacks from the suburbs and concentrated them in the city or merely resulted in racially segregated housing patterns within each district. 388 F. Supp. at 587.[9]

Here, in contrast, the court below specifically gauged the interdistrict effects of state housing discrimination,

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[8] In *Richmond* for example, the court of appeals could not conclude from the record whether Richmond's use of discriminatory housing tools was greater or lesser than that of the suburban counties. Thus the court felt unable to determine whether such discrimination had an impact on interdistrict movement. 462 F.2d at 1066.

[9] And, as noted in *Milliken*, the court of appeals expressly stated that it had not considered evidence of housing discrimination or in its effects. 484 F.2d 215, 242 (6th Cir. 1973).

noting for example that the impact of state toleration of real estate discrimination was to deny almost all new housing opportunities to blacks in the suburbs while having a much more marginal impact in the city (A. 11). Similarly, because of the extraterritorial jurisdiction of the Wilmington Housing Authority, it was clear here that suburban county discrimination denied central city black residents the opportunity to occupy public housing in the suburbs (A. 11), whereas in *Richmond* the court of appeals opined that the lack of public housing in the suburbs might only have affected low-income white suburbanites. 462 F.2d at 1066. Thus in this case governmental discrimination in housing clearly had interdistrict effects and clearly helped explain why over a twenty-year period the percentage of black residents living in the suburbs actually declined while the total suburban population increased fivefold (A. 7).

Appellants apparently recognize the damaging impact of these findings to their case for they seek to offer noninvidious explanations for Delaware's discriminatory housing practices. Thus in appellants' view, state sanction for the racially exclusionary code of the real estate board becomes merely an effort to "avoid upsetting established neighborhoods—an admonition in part against 'block-busting' " and racially discriminatory site selection in public housing becomes merely "the erection of public housing where there was a demand for it, *i.e.*, in the city rather than the suburbs" (Appellants' Jurisdictional Statement at 8). No basis for these fanciful interpretations appears either in the record or in fact. Indeed, in characterizing state housing policies as racially discriminatory, the court below did not cut any new ground but simply applied

settled doctrine that state sanction of exclusionary real estate practices and discriminatory site selection in public housing transgresses the Constitution and laws of the United States. See, e.g., *Crow* v. *Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd per curiam*, 457 F.2d 788 (5th Cir. 1972); *Gautreaux* v. *Romney*, 488 F.2d 731 (7th Cir. 1971); *Shannon* v. *HUD*, 436 F.2d 809 (3rd Cir. 1970). Cf. *United States* v. *Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3671 (June 24, 1975). The only "new" element in this case is that the court below conscientiously sought to determine whether these indisputably illegal housing practices had the effect of containing black people within the City of Wilmington and contributing to the creation of racially segregated school districts in the Wilmington metropolitan area. Its affirmative conclusion is well supported by the record and consistent with the criteria set forth in *Milliken*.

On each count where appellants have attempted to concoct a conflict between the decision of the court below and the ruling in *Milliken*, they have failed to point to any specifics to substantiate their claims.[10] To the contrary, the lower court's conclusion that the record in this case made it necessary to consider interdistrict school desegregation remedies was based upon factual determinations materially different in every respect from those in *Milliken* and upon a precise application of the principles enunciated in that case. In so

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[10] In light of this failure, appellants' further gratuitous charge that the trial court found this Court's judgment in *Milliken* "distasteful" and therefore engaged in a "flagrant rejection" of its duty to follow Supreme Court judgments is unworthy of comment (Appellants' Jurisdictional Statement at 12).

concluding, the trial court also acted consistently with decisions of courts of appeals and district courts rendered both before and after *Milliken*.

B. Invalidation of the Delaware Educational Advancement Act Was Required by the Well Established Equal Protection Doctrine That Racial Classifications Must Fall Unless Supported by a Compelling Justification.

In the previous section it was shown that the decision below is consistent with *Milliken* v. *Bradley* and other decisions dealing with the use of racial considerations in the drawing or redrawing of school district lines. Here we demonstrate that invalidation of Delaware's Educational Advancement Act was consistent with, and indeed dictated by, a larger body of equal protection doctrine holding that state imposed racial classifications must be invalidated where they are not supported by a compelling state interest.

There can be little question that in freezing the school district lines of Wilmington while authorizing boundary changes in virtually all other districts the Delaware legislature placed special burdens within the government process on minorities seeking to end racial segregation in public schools, burdens that were not placed on groups seeking other ends through school district reorganization. The impact of this disparate treatment, which came at a time when the state's dual system still had not been disestablished, was upon the most heavily black district in the state in public school composition, a district containing nearly one half of the total black population of the state. Where a statute so treats racial problems differently from related governmental interests, it clearly constitutes a suspect racial classification. *Lee* v. *Nyquist*, 318 F. Supp. 710

(W.D. N.Y. 1970), *aff'd*, 402 U.S. 935 (1971); *Hunter* v. *Erickson*, 393 U.S. 385 (1969).[11]

While it is true that the determination that a racial classification exists does not end the inquiry, the state bears a heavy burden in seeking to provide compelling justification for its actions. The court below painstakingly analyzed all proferred justifications for the Wilmington exception and found them wanting. The assertion that the Delaware Constitution requested the legislature to muster a two-thirds vote to alter Wilmington boundaries was simply erroneous under Delaware law (A. 25-27). The claim that historic considerations gave greater sanctity to the Wilmington district lines than to other district boundaries could not be supported, particularly in light of the great variety of state actions demonstrating the permeability of Wilmington's school boundaries and the fact that no other Delaware city was treated in a similar fashion (A. 27-28). Nor was any educational basis established for imposing a maximum enrollment of 12,000 for each district; indeed the weight of testimony by educators was that districts having substantially larger enrollments are sound educational and administrative units (A. 28-30).

Enactments which without any compelling justification treat racial minorities differently from others are no less violative of the equal protection clause when the classification is implicitly racial rather than explicit.

[11] The equal protection claims of plaintiffs in such cases are not impaired by the fact that they may not have had a pre-existing constitutional right to the objective that the state enactment impeded, although this may be deemed a moot point in the instant case where so much independent evidence of interdistrict violations has been adduced. (See pp. 17-22, *supra*.)

Gaffney v. *Cummings*, 412 U.S. 735 (1973); *White* v. *Regester*, 412 U.S. 755 (1973); *Reitman* v. *Mulkey*, 387 U.S. 369 (1961). Cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). Nor is evidence of racial intent a prerequisite to finding such a violation. *Wright* v. *Council of the City of Emporia*, 407 U.S. 45 (1972).[12]

Cases cited by appellants as evidence that the court below rejected the opinions of this Court are simply inapposite. They involved classifications that were based, if anything, on wealth or class but certainly not race, *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973); *James* v. *Valtierra*, 402 U.S. 137 (1971); cases where the racial impact was extremely remote, e.g., *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); and cases where there was no classification at all and the impact of the challenged action fell upon all racial groups alike, e.g., *Palmer* v. *Thompson*, 403 U.S. 217 (1971). Decisions such as those cited simply illustrate that where the impact of an enactment is not racial, parties claiming to be aggrieved may have difficulty in invoking strict scrutiny of the enactment by this Court. In contrast, where state action however couched has materially disadvantaged racial minorities this Court, remembering the original thrust of the Fourteenth Amendment, has required the highest burden of justification. *Hunter* v. *Erickson, supra; Reitman* v.

[12] The court below prudently withheld any judgment that the Wilmington exclusion was racially motivated (A. 19-20), although state officials admitted that the exception was included in part because of racial hostility to desegregation in white New Castle County (Tr. 1010, 1077). *See also*, 379 F. Supp. at 1227-1228 (Gibbons, J.). The court had no doubt, however, that in terms of its historical context and immediate objective as well as ultimate effect, the Wilmington exception was racially discriminatory (A. 22).

Mulkey, supra; Wright v. *Council of the City of Emporia, supra; Gomillion* v. *Lightfoot, supra; Loving* v. *Virginia,* 368 U.S. 1 (1967); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964). In finding that appellants failed to justify their actions in singling out black children of Wilmington for separate and disparate treatment the court below was true both to this line of decisions and to the Fourteenth Amendment.

CONCLUSION

This appeal should be dismissed as premature since no injunctive order requiring interdistrict relief has yet issued and determinations still to be made in the court below may make it unnecessary for this Court ever to reach the questions pressed by appellants.

If this Court should reach the merits, the decision below should be summarily affirmed as clearly correct. The opinions and record in this case demonstrate that the State of Delaware in several of its manifestations contributed to the maintenance and perpetuation of a system of racially segregated public schools in Wilmington and New Castle County. The standards set for interdistrict relief in *Milliken* v. *Bradley* were plainly met. And the court below faithfully followed the dictates of the Fourteenth Amendment to the Constitution and opinions of this Court in holding that Delaware's reorganization statute could not stand strict

scrutiny and constituted a prohibited racial classification.

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Certificate of Service

It is hereby certified that in compliance with Rule 33(1) of this Court three copies each of this Motion to Dismiss or Affirm have been forwarded by depositing same in a United States mail box, first class or air mail postage prepaid, to the following:

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